RECENT CASE NOTES

AGENCY—FRAUD—LIABILITY OF AGENT.—The defendant, as agent for the land company, obtained from the plaintiff by fraud a contract of sale for certain lands. The plaintiff made payments to the defendant, who turned them over to the land company. Having discovered the fraud, subsequent to the payment over, the plaintiff brought suit against the defendant for all the money paid. *Held,* that the plaintiff could recover. *Peterson v. McManus* (1919, Iowa) 172 N. W. 460.

It seems well settled that an agent is liable for all money obtained through a contract which is repudiated for fraud, if he has not paid it over. *Kleine Bros. v. Gidcomb* (1913, Tex. Civ. App.) 152 S. W. 462. And the principal case follows the weight of authority in holding that payment of the money to the principal does not affect the agent's liability. The courts treat the case as if there was no agency and regard payment to the principal as in no way different from any other disposition of the money fraudulently obtained. *Townson v. Wilson* (1808, C. P.) 1 Camp. 396; *Seidel v. Peckworth* (1823, Pa.) 10 Serg. & R. 442; *Messer-Moore Ins. & Real Estate Co. v. Trotwood Land Co.* (1911) 170 Ala. 473, 54 So. 228. It is sometimes said, however, that where the purchaser delivers the money to the agent with the understanding that it is to be turned over to the principal immediately, he should recover only from the latter. See *Butler v. Livermore* (1868, N. Y.) 52 Barb. 570, 579. But the only ground for such a doctrine is an inference that the purchaser has consented that the agent should not be liable. The inference can only be drawn from the consent to the payment over, which consent was obtained by the fraud of the agent. There is likewise a tendency to limit the liability of the agent unless notice is given not to pay over. *Cf. Hardy v. American Express Co.* (1902) 182 Mass. 328, 65 N. E. 375. This seems to rest on the curious premise that the defrauder should be protected until informed of his fraud. The degree of the liability has appeared unjust to some judges, who have maintained that recovery of the entire sum paid should be had from the agent only after it is impossible to reach the principal. *Cf. Beslry v. Monahan* (1908) 137 Iowa, 650, 112 N. W. 1102. There is little precedent to support this and no need for such a holding. The result would be to place on the defrauded party the burden of proving the inaccessibility of the principal. In most cases, if the principal were within reach, suit would be brought against him anyhow, since the money handed over would probably be in his possession.

ATTORNEY AND CLIENT—LIEN OF ATTORNEY—SETTLEMENT BY PARTIES.—The plaintiff sued for the conversion of an automobile, asking large damages. The answer showed counter-claims for $2,000 on notes of the plaintiff and other items. After having pleaded, the plaintiff settled out of court without his attorney's knowledge and obtained a discharge of the counter-claims, together with $470 in cash. The attorney, having contracted for forty-five *per cent.* of whatever amount might be recovered, obtained an order to have the settlement set aside and his share determined. The lower court gave him judgment for $1,120. *Held,* that the attorney's statutory lien on the cause of action after summons attaches only to the clear balance recovered after all cross-demands and equities are set off, even if these latter have nothing to do with the cause of action, and that the judgment should be modified to $225. *Wildung v. Security Mortgage Co.* (1919, Minn.) 173 N. W. 429.

It has long been recognized that an attorney has a lien on all papers or moneys of his client in his possession for his just compensation. He also has been given a specific lien on judgments recovered by him for his clients. In England this lien was only on the costs awarded by the court, and some states in this country followed that rule. *Mitchell v. Oldfield* (1791, K. B.) 4 T. R. 123; *Currier v. Boston & Me. R. R. Co.* (1858) 37 N. H. 223. Generally, however, his lien attaches for the amount of compensation for which he contracted. A judgment debtor is entitled in equity or by statute to have any claims he may hold against the judgment creditor set off against the judgment. *Ex parte Rhodes* (1809, Eng. Ch.) 15 Ves. 539; *Hurst v. Sheets* (1866) 21 Iowa, 501. The question raised by the principal case is whether or not the lien of the attorney on the judgment or cause of action is superior to the right of the judgment debtor to set off his claims. It seems settled that when these claims arise in the same suit, as a defense for instance, the lien attaches only to the clear balance struck between the parties. *Ex parte Rhodes, supra; Popplewell v. Hill* (1892) 55 Ark. 622, 18 S. W. 1054. When, however, the cross-demand arises entirely outside the cause of action, the question has had far from uniform answers. See *McDonald v. Napier* (1853) 14 Ga. 89, 108. It appears that the growing majority of states as well as the English rule favor the attorney's lien, contrary to the view expressed by the decision in the principal case. It might be distinguished, however, because it involves a settlement before judgment, and the equity of the attorney's claim is not so clear. A rather unique solution has been found that the claim should have precedence, as between the attorney and the judgment debtor, which was first actively enforced by notice given to the other party. *Hroch v. Aultman* (1893) 3 S. D. 477, 54 N. W. 269.

BANKRUPTCY—PREFERENCES—DATE AS TO WHICH PREFERENTIAL CHARACTER OF TRANSFER IS DETERMINED.—The defendant received a partial payment, less than fifty *per cent.*, of his claim against an insolvent debtor, within four months of the latter's bankruptcy. At the time of payment the bankrupt had assets exceeding fifty *per cent.* of his liabilities. In a suit by the trustee in bankruptcy to recover the payment as a preference, the court charged that "the test of a preference is the payment of a larger percentage of the creditor's claim than others of the same class receive." *Held,* that the charge was incorrect, since the preferential character of a payment depends upon its effect at the time when made and not upon what other creditors will receive on final settlement of the estate in bankruptcy. *Slayton v. Drown* (1919, Vt.) 107 Atl. 307.

This case raises an interesting question in the interpretation of the Bankruptcy Act upon which there is surprisingly little authority. Sec. 60a defines preferences and declares that a transfer by an insolvent debtor is a preference if, *inter alia,* "the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." U. S. Comp. Stat. 1916, sec. 9644. Shall the effect of the transfer in giving the transferee an advantage over other creditors of the same class be tested by the creditor's ability to pay a similar percentage to such other creditors (1) at the date of the transfer, or (2) at the date of the filing of the petition in bankruptcy, or (3) by the dividends ultimately received by the other creditors from the trustee in bankruptcy? The principal case adopts the first alternative. *Dicta* may be found which support it. *Brittain Dry-goods Co. v. Bertenshaw* (1904) 68 Kans. 734, 75 Pac. 1027; *Herzberg v. Riddle* (1911) 171 Ala. 368, 37, 54 So. 635, 63. The argument is based chiefly upon the language of Sec. 60b which defines voidable preferences and declares that if the insolvent debtor make a transfer within

four months of the bankruptcy petition and "the . . . transfer *then* operate as a preference, and the person receiving it . . . shall *then* have reasonable cause to believe that the transfer would effect a preference, it shall be voidable by the trustee." Despite the plausible argument that the use of the word "then" indicates that the preferential character of the transfer is to be tested by its effect when made and that the creditor's belief must be predicated upon the then existing state of affairs, it is believed that the sounder view adopts the second alternative above mentioned, the date of the filing of the petition. This view is persuasively presented in *Rubenstein v. Lottow* (1916) 223 Mass. 227, 111 N. E. 973. It harmonizes with the general policy of determining all bankruptcy questions in so far as possible with reference to conditions as they exist when the petition is filed. *Cf. Everett v. Judson* (1913) 228 U. S. 474, 477, 33 Sup. Ct. 568, 570. It has the practical advantage of testing all preferences by the conditions existing at a given time, instead of requiring the court in the case of successive preferences to investigate the precise ratio of the bankrupt's debts and liabilities at numerous dates within the four months' period. It is consistent with the language of the Act for by treating "preference" in 60b as denoting only such transactions as are defined as preferences in sec. 60a it is possible to construe sec. 60b as making voidable only such transfers as operate when made to produce a situation which at the time of bankruptcy will give the transferee an advantage over other creditors. It is quite possible for a creditor to have reasonable cause to believe that the result of the transfer may be an ultimate preference when bankruptcy comes, although not one at the moment.

CONSTITUTIONAL LAW—EXERCISE OF WAR POWER—PROHIBITION ACT.—The complainants, owners of vineyards in California, who used their crops for the manufacture of wines, sued for an injunction, *pendente lite,* against the United States District Attorney and a Collector of Internal Revenue for district of New York, to prevent seizures and prosecutions under the Act of Congress of November 21, 1918, commonly known as the War-Time Prohibition Act. This complaint was based on the ground that the enforcement of the act was unconstitutional inasmuch as the emergency justifying an exercise of war powers was over. *Held,* that the injunction should not be granted. *Scatena, Lawson & Perelli v. Caffey and Edward* (1919, S. D. N. Y.) N. Y. L. J. 1555.

The Act of November 21, 1918, was passed as a war measure and has been held a valid exercise of the war power. *Jacob Hoffman Brewing Co. v. McEllicott and Caffey* (June 26, 1919) C. C. A. 2d, October Term, 1918. Since the war power is vested in Congress and the Executive Department for the duration of the war, before holding an exercise thereof invalid, the courts would have to hold that the war is over. But the ends of wars have in the past been determined by the Political Department of the Government. *Conley v. Calhoun County Supervisors* (1868) 2 W. Va. 416. The civil war was terminated in the different states by a series of Presidential Proclamations. *United States v. Anderson* (1869, U. S.) 9 Wall. 56; *The Protector* (1871, U. S.) 12 Wall. 100. The Spanish-American war, a foreign war, was ended by the signing of the treaty of peace, the protocol, similar to the armistice of 1918, having no operative legal effect. *Nephews v. U. S.* (1908) 43 Ct. Cl. 430; *McLeod v. United States* (1910) 45 Ct. Cl. 339. In either case the courts take judicial notice of the acts of the other departments. No cases have been found where courts have admitted evidence to dispute the facts they are bound to know. The attitude of the judicial department has been that it was a question for the other departments to determine, and the inference is strong that no

evidence would be admitted. See *Philips v. Hatch* (1871, C. C. D. Iowa) 1 Dill. 571; *In re Wulzen* (1916, S. D. Oh. E. D.) 235 Fed. 362, 365. If no evidence is admitted, the knowledge of the courts is limited to what they judicially notice. One court found in the President's speech to Congress of November 11, 1918, in which he declared that "The war thus comes to an end," an official declaration which could be noticed. *United States v. Hicks* (1919, W. D. Ky.) 256 Fed. 707. But nowhere else has it been given such significance. The conclusion seems warranted that, until the other departments act, the judiciary must continue to recognize the existence of a state of war, and to consider an exercise of the war power as valid. If this be true, the other departments can alone terminate the period within which these special powers are theirs.

CONSTITUTIONAL LAW—TREATIES—EFFECT ON STATE LAWS.—A treaty between the United States and Great Britain provided that the citizens of each of the contracting nations might dispose of their personal property within the jurisdiction of the other and that the heirs or legatees, who are either resident or non-resident citizens of the contracting nations, should succeed to personal property and pay the same duties as the citizens of the country where the property is located would have to pay in similar cases. A state statute imposed upon non-resident aliens a larger tax than that levied upon the state citizens and resident aliens. *Held,* that as against citizens of Great Britain, the tax in excess of that imposed upon the citizens of the state was invalid. *Trott v. State* (1919, N. D.) 171 N. W. 827.

The effect of treaties on existing state laws was a question presented to the Supreme Court soon after the formation of the Union. *Ware v. Hylton* (1796, U. S.) 3 Dall. 199. It has ever since been held that a treaty supersedes and nullifies all conflicting provisions in the constitution and laws of any state, and that whenever there is such a conflict, it is the duty of the judges of each state to uphold and enforce the treaty provisions. See *Whitney v. Robertson* (1888) 124 U. S. 190, 8 Sup. Ct. 456; *Chryssikos v. Demarco* (1919, Md.) 107 Atl. 358. However, in spite of the seeming uniformity of decisions on this point, cases are continually arising in which the effect of a treaty is contested. See *In re Moynihan* (1915) 172 Iowa, 571, 151 N. W. 504 (treaty with England); *Brown v. Peterson* (1919, Iowa) 107 N. W. 444 (treaty with Sweden). The decision in the principal case is obviously sound.

CONTRACTS—ACCORD—SPECIFIC PERFORMANCE.—The plaintiff was indebted to the defendant, who brought suit at law. That case was pending at the time of the instant action. Then they compromised, in writing and under seal, whereby the plaintiff promised that he would pay to the defendant a certain sum on a specific date, and certain monthly installments for the support of the defendant for life; and the defendant promised that, upon receipt of this said sum, she would reassign to the plaintiff certain life insurance policies, indorse to him a check payable to their joint order, and return a will and certain books and documents. The plaintiff duly tendered and demanded performance by the defendant who refused to perform. The plaintiff, who averred continued readiness to perform, then brought this bill in equity for specific performance. *Held,* that this compromise was an accord only, and could not form the basis of an action. Laughlin, J. *dissenting. Moers v. Moers* (1919, App. Div.) 176 N. Y. Supp. 277.

The court followed the ancient common-law doctrine that on an accord no

remedy lies. *Lynn v. Bruce* (1794, C. P.) 2 H. Bl. 317; *Allen v. Harris* (1537, C. P.) 1 Ld. Raym, 122. This doctrine developed when bilateral contracts were not recognized by the early common law; and an accord is generally, if not always, a bilateral contract. But now, since bilateral contracts are enforceable everywhere, there is no reason for the continuance of this. And accords are now enforceable contracts in most jurisdictions. *Nash v. Armstrong* (1861, C. P.) 10 C. B. N. S. 259; *Schweider v. Lang* (1882) 29 Minn. 254, 13 N. W. 33; *Hunt v. Brown* (1888) 146 Mass. 253, 15 N. E. 587. In the principal case, the accord is a good bilateral contract, and, since tender was properly made, the court erred in saying that the defendant was never under a duty because an actual payment was never made. The defendant can not defeat the plaintiff's right by refusal of tender. Actual payment by the plaintiff was waived by the defendant's refusal to accept tender. See *Stafford v. Pooler* (1867, N. Y.) 67 Barb. 143. The general rule is that an executory accord does not bar an action at law; and that tender of performance of the accord likewise is no bar. *Ryan v. Ward* (1872) 48 N. Y. 204; *Kromer v. Heins* (1879) 75 N. Y. 574. If, however, the remedy at law is inadequate and the doctrine of mutuality of performance is not involved, an executory accord which fulfills contract requirements will be enforced in equity, if tender has been made. *Chicora Fer. Co. v. Duncan* (1900) 91 Md. 144, 46 Atl. 347; *Very v. Levy* (1851, U. S.) 13 How. 345. The plaintiff could then plead his release in bar to the pending action at law. The tendency of courts to-day seems to be to enforce compromises of disputed claims whenever possible on grounds of public policy; and it is submitted that few modern courts would follow this case. See Corbin, *Discharge of Contracts* (1913) 22 YALE LAW JOURNAL, 529, 530.

CONTRACTS—ACCORD—TORT CLAIMS—ATTACHMENT.—A state statute provided that a creditor, by a bill in equity, could attach a chose in action which belonged to the debtor and was by its nature assignable. The defendant had a tort claim for personal injuries against A and entered into an agreement with him to accept $850 in full satisfaction of his claim. The plaintiff brought a bill in equity against the defendant and secured a judgment in satisfaction of which he attempted to reach the claim of the defendant to the $850. *Held,* that this claim could not be reached. *White Sewing Machine Co. v. Morrison* (1919, Mass.) 122, N. E. 291.

A tort claim for personal injuries before judgment has been entered is not assignable nor can it be reached, under the above statute, by a creditor's bill. *Bennett v. Sweet* (1898) 171 Mass. 600, 51 N. E. 183; *Wilde v. Mahoney* (1903) 183 Mass. 455, 67 N. E. 337. The agreement with A, an accord executory, is an enforceable bilateral contract. *Schweider v. Lang* (1882) 29 Minn. 254, 13 N. W. 33. But the contract of accord alone is no defence to an action on the tort claim. *Kromer v. Hein* (1879) 75 N. Y. 574; *Field v. Aldrich* (1895) 162 Mass. 587, 39 N. E. 288. Hence the defendant secured a contract right to the $850, conditional on his tendering a release from liability on the tort claim to A. He could sue either on the contract of accord, or on the tort claim, subject to damages for breach of contract, in case of the latter, if A made proper tender. However, a creditor does not have the power of choosing which of two remedies the debtor shall elect. *Lewis v. Dubose* (1856) 29 Ala. 219; *Johnson v. Lamping* (1867) 34 Calif. 293. So it would seem that the instant case was correctly decided.

CONTRACTS—CONSIDERATION—CANCELLATION ON NOTICE.—The defendant dealer made a contract with the plaintiff manufacturer by which the former was given the exclusive privilege of sale of the latter's products within a certain terri-

tory. There was a provision that the dealer could not recover for loss of profits resulting from the failure of the manufacturer to deliver goods ordered, and another provision allowed cancellation of the contract by either party upon sixty days' notice, or immediately upon any violation of the agreement. The plaintiff brought suit on a note given by the defendant in part payment for goods delivered, and the defendant brought a cross-complaint for loss of profits which he alleged had been sustained as a result of nondelivery by the plaintiff. *Held*, that the cross-complaint was not enforceable because of the provision that the dealer could not recover for loss of profits due to the failure of the manufacturer to fill orders. *Weil v. Chicago Pneumatic Tool Co.* (1919, Ark.) 212 S. W. 313.

In a concurring opinion, McCulloch, C. J., held that there was a valid contract, since the dealer gained the exclusive privilege, for a given period of time, to sell the manufacturer's products within certain territory, and assumed the duties to sell no other products in competition, and to purchase as many as twenty-five automobiles, at a stated price. The right acquired by the defendant, that the plaintiff should not sell to anyone else in the territory assigned, was of value and a direct limitation on the privileges of the plaintiff. Hence there was sufficient consideration for the undertakings of the defendant. For even a small limitation on the rights, privileges, powers, or immunities of one party is held to be sufficient consideration for the other's promise. *Scriba v. Neely* (1908) 130 Mo. App. 258, 109 S. W. 845; *Russell v. Henry C. Patterson Co.* (1912) 48 Pa. Super. Ct. 571; *Harp v. Hamilton* (1915, Tex.) 177 S. W. 565. A contract for future delivery of personal property, which confers upon either party the arbitrary power of cancellation prior to the delivery, would not be enforceable. *Velie Motor Car Co. v. Kopmeier Motor Car Co.* (1912, C. C. A. 7th) 194 Fed. 324; *Oakland Motor Car Co. v. Indiana Automobile Co.* (1912, C. C. A. 7th) 201 Fed. 499. But in the principal case, sixty days' notice was required for cancellation and this would seem to be sufficient to exempt the contract from the rule applied in the above-mentioned cases. It is true that immediate cancellation could be made for any violation of the agreement, but this power could become vested in either party. A contract which reserved to the defendant the privilege to cancel upon fifteen days' notice was held not to be void. *Thomas v. Anthony* (1916) 30 Calif. App. 217, 157 Pac. 823. In the instant case, it seems that the fact that the dealer was given exclusive selling privileges in his territory would be ample consideration for his undertakings, and that, therefore, the contract would be enforceable. Hence, the concurring opinion seems to be sound.

CONTRACTS—PROMISE TO PAY ANTECEDENT DEBT OF ANOTHER—CONSIDERATION-LOAN.—The defendant held claims against B amounting to some $1,400. The mother of B obtained a loan of $200 from the defendant by giving one year notes and mortgages on her real estate to secure the claims against her son as well as the loan to her. The guardian of her estate, appointed after the transaction, brought this action to set aside the notes and mortgages. *Held* (two judges *dissenting*), that the notes and mortgages were without consideration and void except as to the amount of the loan, and that relief should be granted to that extent. *Luing v. Petersen* (1919, Minn.) 172 N. W. 692.

A promise to perform the pre-existing duties of her son would be unenforceable against the mother without some new consideration other than love and affection. *Rann v. Hughes* (1778, H. L.) 7 T. R. 350, note (a); *Schnell v. Nell* (1861) 17 Ind. 29. The duty which the mother undertook in signing the notes, however, was conditional and was not to come into existence unless her son defaulted, except as to the $200. It is not, therefore, a question of the

exchange of unequal sums of money not compensated for by the time element, nor of imposition or undue influence on the mother. *Cf. Shepard v. Rhodes* (1863) 7 R. I. 470. The question squarely raised is whether a loan can be consideration for more than a promise to repay it. It has been held that a loan is consideration not only for a promissory note, but for a promise to pay reasonable attorneys' fees for collection in case it is defaulted. *Barton v. Farmer National Bank* (1887) 122 Ill. 352, 13 N. E. 503; *Fowler v. Trust Co.* (1891) 141 U. S. 411, 12 Sup. Ct. 1. And it has been held that a loan is consideration for an agreement that one of two mortgages executed at the same time should have a prior lien. *Loewen v. Forsee* (1897) 137 Mo. 29, 38 S. W. 712. The value in the instant case of such a surety's promise as the mother made is a very uncertain quantity, depending on the son's credit, and there seems no reason why $200 cash should not be good consideration for it, even if it were perhaps a bad gamble. Except in the exchange of things whose value may be mathematically calculated, courts will not inquire into the adequacy of consideration. *Schnell v. Nell, supra.* It seems very probable, therefore, that other states will follow the minority opinion in the future.

CORPORATIONS—MUNICIPAL CORPORATIONS—LIABILITY FOR TORT—UNLAWFUL USE OF STREET.—The defendant city had granted permission to the Elks to run an automobile race as part of their convention carnival. The race scheduled under this license was later abandoned but a race was run on that afternoon. One of the racing cars ran into a boy who was standing in a crowd of spectators and killed him. In an action by his parents, the jury found the city negligent "in allowing the race to be run and not providing police protection." *Held,* that these were public duties for the exercise of which the city was not liable. *Rose v. Gypsum City* (1919, Kan.) 179 Pac. 348.

It seems evident that while the race was being run, the road could not be safely used for ordinary travel and the finding of the jury established the fact that the city knew of this obstruction. A municipality is under a duty to keep its streets in a reasonably safe and convenient condition for ordinary travel. This duty is considered, in most American jurisdictions, as a common-law obligation; in the others, it is imposed by statute. *Barnes v. District of Columbia* (1875) 91 U. S. 540; *Detroit v. Blackeby* (1870) 21 Mich. 84; Dillion, *Municipal Corporations* (5th ed. 1911) sec. 1691. The extent of this duty is not limited to the repair of structural defects and so the city is liable for failure to remove obstructions in the highway, even though placed there without its fault. 15 *Am. & Eng. Cyc.* (2d ed. 1900) 431. And it is no defence to an action for breach of this duty that the obstruction was the result of the negligent performance of a governmental function. *Savannah v. Jones* (1919, Ga.) 99 S. E. 294, *infra,* p. 129. Where the city licenses the placing of the obstruction, it is liable as a partner. *Cohen v. New York* (1889) 113 N. Y. 532, 21 N. E. 700. Where the obstruction licensed is a street exhibition or carnival, the city has been held liable when the streets have thus been made unsafe. *Richmond v. Smith* (1903) 101 Va. 161, 43 S. E. 345; *Van Cleef v. Chicago* (1909) 240 Ill. 318, 88 N. E. 815; *Wheeler v. Ft. Dodge* (1906) 131 Iowa, 566, 108 N. W. 1057 (rope strung across the road, high above the street). But where the obstruction consists of moving objects subject to human will or direction, there is no liability for failure to prevent or remove. *Robinson v. Greenville* (1885) 42 Oh. St. 625 (riot); *Faulkner v. Aurora* (1882) 95 Ind. 130 (coasting); *Jones v. Williamsburg* (1900) 97 Va. 722, 34 S. E. 883 (riding bicycle on street); *McCarthy v. Munising* (1904) 136 Mich. 622, 99 N. W. 865 (horse-racing). This duty to keep the streets safe seems, therefore, limited

to obstructions which are fixed and stationary, and does not apply to such as require the exercise of the governmental power over the conduct of others. *Cf. Bartlett v. Hooksett* (1868) 48 N. H. 18. But although mere failure to prevent this latter class of obstruction is not a breach of this municipal duty, yet encouraging dangerous conduct by express license does impose a liability. *Little v. Madison* (1880) 49 Wis. 605, 6 N. W. 249; *Johnson v. New York* (1906) 186 N. Y. 139, 78 N. E. 715 (automobile race); but see *Marth v. Kingfisher* (1908) 22 Okla. 602, 98 Pac. 436. It seems, however, that the conduct licensed must be a nuisance *per se*. *Burford v. Grand Rapids* (1884) 53 Mich. 98, 18 N. W. 571. The municipal immunity in the principal case may be explained on the ground that the jury found that the race run was not the one scheduled and thus licensed.

CORPORATIONS—MUNICIPAL CORPORATIONS—TERM OF OFFICE—RESIGNATION.—The respondent was elected to the office of recorder for the term of one year, ending July 10, 1919. The statute creating that office provided that the incumbent should not "be eligible to any other office in the city of Athens during the term of his office as recorder." On August 7, 1918, he resigned to accept an appointment by the Mayor on the Civil Service Commission. *Quo warranto* proceedings were then instituted. *Held,* that the respondent was ineligible to any other office for the whole year for which he was elected to office of recorder. *Rowe v. Tuck* (1919, Ga.) 99 S. E. 303.

The phrase "his term of office" is ambiguous and when in connection with constitutional limitations or statutory disabilities raises the question of legislative intent. It may be used in connection with a disability whch is personal to the incumbent. *State ex rel. Bashford v. Frear* (1909) 138 Wis. 536, 120 N. W. 216. Or in connection with a disability attached to the office. *Foreman v. McEwen* (1904) 209 Ill. 567, 71 N. E. 35 (constitutional prohibition of change of salary). Ordinarily a "term of office" is an entity, separate and distinct from all other terms of the same office. *Thurston v. Clark* (1895) 107 Calif. 285, 40 Pac. 435. It means a fixed and definite period of time. *Polk v. Galusha* (1905) 74 Neb. 188, 104 N. W. 197; *State ex inf. Major ex rel. Sikes v. Williams* (1909) 222 Mo. 268, 121 S. W. 64. This fixed period of time cannot be altered by resolution of appointment. *Stadler v. Detroit* (1865) 13 Mich. 346; *State v. Brady* (1885) 42 Oh. St. 504. It is not the same as "right of incumbency," which may have come to an end although the term still exists. *Palmer v. Commonwealth* (1906) 122 Ky. 693, 92 S. W. 588. In such a case, the one who succeeds to the right of incumbency merely completes the unexpired term. *Baker v. Kirk* (1870) 43 Ind. 517; *Jameson v. Hudson* (1886) 82 Va. 279. The disability in the principal case is one personal to the incumbent. When a personal disability is imposed by ouster, it has been held to extend over the whole period of the term. *State v. Rose* (1906) 74 Kan. 262, 86 Pac. 296. The court in holding that the respondent cannot diminish the period of his disability, by voluntary resignation, seems to have arrived at a sound conclusion.

CRIMINAL LAW—ASSAULT WITH INTENT TO RAPE—SUBSEQUENT YIELDING.—Defendant was convicted of assault with intent to rape. He took exceptions to the refusal of the trial court to give instructions that the defendant could not be found guilty of assault with intent to rape, if the prosecutrix yielded after the assault, to sexual intercourse with the defendant, because of desire and not through fear or inability to resist further. *Held,* that the instruction

was properly refused, since subsequent yielding and consent cannot relate back and cover the preceding acts. Brown, C. J. *dissenting. Gadsden v. State* (1919, Fla.) 82 So. 50.

The principle laid down in the instant case is in line with the weight of authority. *People v. Marrs* (1900) 125 Mich. 376, 84 N. W. 284; *State v. Bagan* (1889) 41 Minn. 285, 43 N. W. 5. There cannot be an assault with intent to rape where the female consents at the time of the assault. See 33 *Cyc.* 1433, note 45. Nor where there was mere solicitation for sexual intercourse, without any demonstration of strenuous force. *State v. Sanders* (1912) 92 S. C. 427, 75 S. E. 702; *Easterling v. State* (1919, Miss.) 82 So. 306. The intent of the defendant to commit rape must be proved, and the female must have offered resistance at the time of the assault, in order to procure conviction for assault with intent to rape. *Hunter v. State* (1892) 29 Fla. 486, 10 So. 730. Voluntary abandonment of purpose may be shown and considered as bearing on his intent. It is probable that the subsequent yielding of the female would be admitted to prove the intent of the accused at the time of the assault, although no case on this point was found.

EQUITY—JURISDICTION—EXTRA-TERRITORIAL EFFECT OF DECREE.—The plaintiff brought suit for divorce against the defendant in the State of Washington. The court having jurisdiction of the cause and the parties, decreed: (1) dissolution of the marriage; (2) that the defendant convey to the plaintiff certain real estate in Iowa. Immediately after the decree, the defendant left Washington and went to Iowa where he transferred the property in question to A who took with notice. The plaintiff brought suit in Iowa upon the Washington decree and prayed that the deed from the defendant to A be set aside and that the defendant be required to convey to plaintiff. Personal service was had on both defendants. *Held,* that the plaintiff was entitled to the relief sought. *Matson v. Matson* (1919, Iowa) 173 N. W. 127.

The power of a "foreign" court to create by decree a personal obligation concerning domestic land has been denied by courts of the *situs* of the land. *Bullock v. Bullock* (1894, Ct. Err. & App.) 52 N. J. Eq. 561, 30 Atl. 676; *Fall v. Fall* (1905) 75 Neb. 104, 120, 113 N. W. 175. Nor can such courts be compelled to recognize the foreign decree. *Fall v. Eastin* (1909) 215 U. S. 1, 30 Sup. Ct. 3. In support of this position two arguments are commonly advanced: (1) That an equitable decree ordering the conveyance of land creates no obligation in another jurisdiction and therefore will not support a suit. *Bullock v. Bullock, supra* (per Magie, J.) 3 Beale, *Cases on the Conflict of Laws* (1902) 348; Beale, *Summary of the Conflict of Laws* (1902) sec. 82; note (1912) 25 HARV. L. REV. 653. A decree for the payment of money, however, is universally recognized as creating a binding obligation. *Post v. Neafie* (1805, N. Y.) 3 Cai. 22; *Pennington v. Gibson* (1853, U. S.) 16 How. 65, 16 L. ed. 847; *Sistare v. Sistare* (1910) 218 U. S. 1, 30 Sup. Ct. 682. It is difficult to see how the decree for money can be satisfactorily distinguished from the decree for conveyance in this respect. (2) That to admit the "foreign" decree would violate the settled principle that real property is "exclusively subject to the laws and jurisdiction of the courts of the state in which it is situated." *Davis v. Headley* (1871) 22 N. J. Eq. 115; *Fall v. Fall, supra.* But a deed executed in pursuance of the "foreign" decree is recognized at the *situs* of the land and cannot be avoided on the ground of duress. *Gilliland v. Inabnit* (1894) 92 Iowa, 46, 60 N. W. 211. So this argument is robbed of its force. The principal case takes the sounder view and finds ample support in authority. *Dunlap v. Byers* (1896) 110 Mich. 109, 67 N. W. 1067; *McCune v. Goodwillie* (1907) 204 Mo. 306, 102 S. W. 997; *Burnley v. Stevenson* (1873) 24 Oh. St.

474; *Mallette v. Scheerer* (1916) 164 Wis. 160 N. W. 182. See Professor Barbour, *The Extra-Territorial Effect of the Equitable Decree* (1919) 17 MICH. L. REV. 527.

EQUITY—JURISDICTION—POWER TO CREATE A PRIMARY RIGHT—SEPARATION AGREEMENT.—A separation agreement provided for a fixed payment of $700 a month to the wife, and that in case of "any material change in the circumstances of either of the parties hereto either party hereto shall have the right to apply to any court of competent jurisdiction for a modification" of the sum to be paid. Later the wife became wealthy by reason of her stocks in companies making war profits, and the husband's business as a New York real estate lawyer was largely destroyed by war conditions. The husband brought a bill in equity for specific enforcement of the contract, asking that the sum to be paid should be greatly reduced. *Held,* that the plaintiff was not entitled to the relief asked. *Stoddard v. Stoddard* (1919, N. Y.) 124 N. E. 91.

It was the court's opinion that it had no jurisdiction to reduce the sum to be paid and thus modify the contract; this not being a matrimonial action to determine alimony. It is clear that jurisdiction cannot be conferred upon a court by mere consent or waiver or agreement of the parties. *Eaton v. Eaton* (1919, Mass.) 124 N. E. 37. It is no doubt true, also, that in general a court has no jurisdiction to create a *primary* right. The operative facts sufficient to create the legal relation must exist before action. In the present case the court believed that the contract created a primary right in the wife to $700 a month, no more and no less, and that the clause providing for modification was an attempt to confer upon a court jurisdiction to create a different primary right. On this theory the legally operative fact creating a privilege in the husband to pay less than $700 would be not the new circumstances of the parties, but the decree of the court itself. It would seem not unreasonable, however, to construe the contract to mean that the new circumstances shall operate to reduce the wife's right to a "reasonable sum." If so construed, the contract should be enforceable, just as contracts to pay a reasonable price are enforced, the amount being left to the jury. See *Joy v. St. Louis* (1891) 138 U. S. 1, 11 Sup. Ct. 243. This construction, however, seems to deprive the plaintiff of any right to relief in equity; for he needs only to refuse to pay more than the reasonable sum and has a good defence when sued for more. Of course, there is uncertainty as to how much he should tender, and it would be of advantage if he could get a declaratory judgment establishing the exact extent of his duty and of the wife's right. See Borchard, *The Declaratory Judgment* (1918) 28 YALE LAW JOURNAL, 1, 105. In *Kelso v. Kelly* (1860, N. Y. C. P.) 1 Daly, 419, the parties had agreed on the renewal of a lease with an arbitration to fix the rental, but the defendant refused to appoint an arbitrator. The court decreed specific performance and itself fixed the amount of the rental. This decree seems to create a primary right; for, by the contract, the finding of an arbitrator was a condition precedent to an enforceable duty to pay rent. It is possible, however, to distinguish the case on the ground that the defendant had committed a breach of an existing primary duty to appoint an arbitrator, and that the jurisdiction of the court to compel payment of a reasonable sum fixed by the court was created by this breach and not by agreement. Like *Kelso v. Kelly* are *Gregory v. Mighell* (1811, Eng. Ch.) 18 Ves. 328; *Johnson v. Conger* (1861, N. Y. Gen. T.) 14 Abb. Pr. 195.

LABOR UNIONS—INJUNCTIONS AGAINST BOYCOTTS.—The plaintiff refused to accede to a request by the defendant union that he employ only union men in his drayage business. Whereupon, the union ordered its members to have

no dealings with the plaintiff and notified the business men in the community that, unless they withdrew their custom from the plaintiff, they might expect labor trouble with their own employees. The plaintiff brought suit to enjoin these practices. *Held,* that the defendant union should be enjoined from violating the plaintiff's "free liberty to contract." *Auburn Draying Co. v. Wardell* (1919, N. Y.) 124 N. E. 97.

An individual is privileged to withdraw his patronage from anyone he wishes, but he may not go farther and, by threats or intimidation, induce third parties to cease their dealings. *Peek v. Northern Pacific R. R.* (1915) 51 Mont. 295, 152 Pac. 421; *Krigbaum v. Sbarbaro* (1913) 23 Calif. App. 427, 138 Pac. 364. He may not even carry out his purpose by setting up a rival business to attract customers where his motive is to maliciously destroy a settled business and not to engage in honest competition. *Tuttle v. Buck* (1909) 107 Minn. 145, 119 N. W. 946; *Boggs v. Duncan-Schell Furniture Co.* (1913) 163 Iowa, 106, 143 N. W. 482. The same principles apply to a labor union's attempts to boycott a hostile business. The members of a union are privileged to combine in an agreement to cease dealing with the enemy. *Wilson v. Hey* (1908) 232 Ill. 389, 83 N. E. 928; *Mills v. U. S. Printing Co.* (1904) 99 App. Div. 605, 91 N. Y. Supp. 185. Such action is known as the primary boycott and the privilege to pursue it rests upon exactly the same grounds as the analogous privilege to go on strike. Martin, *The Modern Law of Labor Unions* (1910) sec. 71. But when the union goes farther and attempts to induce outsiders to act with them, they are in the field of the secondary boycott where privileges are few. The use of force, threats, or intimidation is enjoinable. *My Maryland Lodge v. Adt* (1905) 100 Md. 238, 59 Atl. 721; *Beck v. Railway Teamsters' Union* (1898) 118 Mich. 497, 77 N. W. 13. And the courts are quick to perceive the possibility of force in any action. The publication of a business as "unfair" has been construed as a threat and enjoined. *American Federation of Labor v. Buck's Stove and Range Co.* (1909, D. C.) 33 App. Cas. 83. But where the action of the union is in the form of a mere request to the public to withdraw patronage, no injunction will issue. *Heitkamper v. Hoffman* (1917) 99 Misc. Rep. 543, 164 N. Y. Supp. 533; *Pierce v. Stablemen's Union* (1909) 156 Calif. 70, 103 Pac. 324. These cases emphasize the fact that there must be the element of force in any true boycott, a fact which is often lost sight of in the popular use of the word. *Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 114 S. W. 997.

LIENS—MECHANICS LIENS—PAYMENT BY OWNER.—The defendant made payment to a contractor with instructions that the latter pay the plaintiff, the material man, and discharge the lien which had accrued in favor of the plaintiff for the material which went into defendant's house. The contractor paid the plaintiff without giving instructions as to the application of the money; the plaintiff applied it to a former debt of the contractor and then sought to assert his lien against defendant's house. *Held,* that he could not. *Farr v. Weaver* (1919, W. Va.) 99 S. E. 395.

It is well settled that when a debtor pays and does not specify to what debt the payment is to be applied, the creditor may apply it to any of them. *Jefferson v. Church of St. Matthew* (1889) 41 Minn. 392, 43 N. W. 74; *Thacker v. Bullock Lumber Co.* (1910) 140 Ky. 463, 131 S. W. 271. So it has been held, in opposition to the instant case, that where the material man does not know the source of the payment, he does not have to apply it to the cancelling of his lien against the owner who advanced the money. *Thacker v. Bullock, supra.* But there is authority for the converse; that although the material man

does not know the source he must apply the payment to the credit of the owner paying it. This imposes a duty upon him to ascertain from whence it came. *Sioux City Foundry & Mfg. Co. v. Merton* (1916) 174 Iowa, 332, 156 N. W. 367. On the other hand, there are cases which hold that although he knows the source he is not under a duty to apply it to the account of the owner who pays it. *Pipkorn Co. v. Evangelical Lutheran St. Jacobi Society* (1911) 144 Wis. 501, 129 N. W. 516. And the converse of this last is held; that if he knows the source he must apply it to the credit of the owner paying. *Hughes v. Flint* (1911) 61 Wash. 460, 112 Pac. 633. The debtor may specify to what debt the payment shall be applied and his direction is controlling. *Brink v. Walter* (1911) 145 Ky. 17, 139 S. W. 1064. But if he does not the law presumes, *prima facie,* that it was applied to the oldest one. *Shepard v. Steele* (1870) 43 N. Y. 52, 60. And it has been held that if the contractor makes a payment on general account without directing application it must be applied to the oldest item. *Dey v. Anderson* (1877) 39 N. J. L. 199, 205. There is authority for the proposition that if the owner wants the money paid on his account he must give seasonable notice to the material man to apply it in such manner. *Jefferson v. Church of St. Matthew, supra.* The principal case seems to have taken the best position among the different possibilities; that if the material man knows for which debt the money was given, he must apply it to the payment of the same; that if he does not know, in the absence of instructions, he can make such application as he wishes. This view puts the burden on the owner to see that the desired credit is given for his money and gives him a right against the material man that he shall so use it when the purpose for which it was given is communicated to him.

MORTGAGES—FORECLOSURE SALE—REDEMPTION.—The plaintiff purchased the defendant's property at a foreclosure sale and then paid the back taxes on the same. Later the defendant redeemed this property under a state statute by payment of the sale price and interest. Another state statute permitted anyone having a lien on property to pay the taxes thereon and add this amount to his lien. The plaintiff sued to establish a lien for the amount he paid for the back taxes. *Held,* that the lien would not be granted. Moore and Kulen, J. J. *dissenting. Wood v. Button* (1919, Mich.) 172 N. W. 422.

The instant case by the strict construction of the statute and the refusal of a lien to the plaintiff, is in accord with some authority and much *dicta,* but equitable principles seem to call for an opposite conclusion. *Government Building & Loan Inst. v. Richards* (1903) 32 Ind. App. 24, 68 N. E. 1039; see *Walton v. Hollywood* (1882) 47 Mich. 385, 11 N. W. 209; *contra, Northern Inv. Co. v. Frey Real Estate and Investment Co.* (1905) 33 Colo. 480, 81 Pac. 300. The position of the purchaser during the redemption period appears analogous to that of a mortgagee who may, in equity, add to the mortgage debt taxes paid prior to the foreclosure sale. Jones, *Mortgages* (7th ed. 1915) sec. 1080. Like the mortgagee, the purchaser's title is conditional; and, as in the case of the mortgagor, the redeemer ought, in equity, to be compelled to refund the taxes paid by the purchaser. The same reason which prompted the courts to create an equitable lien in favor of the mortgagee exists here; that payment of taxes is essential for the protection of the security and eventually inures to the benefit of the mortgagor or redeemer. To deny such a lien would not only undeservedly enrich the redeemer, but tend to destroy the market value of such property at foreclosure sales. And so it has been generally held that one who has paid taxes to protect his rights may be subrogated to the tax lien of the state. *Title Guaranty & Trust Co. v. Haven*

(1909) 196 N. Y. 487, 89 N. E. 1082. *Cf. Sucker v. Cranmer* (1914) 127 Minn. 124, 149 N. W. 16. It has also been held that one who in good faith paid taxes on property with the intention of protecting his lien is entitled to be subrogated to the lien of the state, although the lien supposed to exist and for the protection of which the person paid the taxes did not in fact exist. *Spokane v. Security Sav. Soc.* (1907) 46 Wash. 150, 89 Pac. 466; *Kemp v. Cossart* (1885) 47 Ark. 62, 14 S. W. 46. Therefore, it is submitted that the plaintiff should have been granted an equitable lien. Also, it seems well settled that most modern courts would have allowed a quasi-contractual remedy, if proper pleadings were drawn. *Hogg v. Longstreet* (1881) 97 Pa. St. 255; Woodward, *Quasi-Contracts* (1913) sec. 248.

MORTGAGES—USURY—STATUTORY DEFENCE.—A state statute made all contracts for the payment of loans with usurious interest unenforcible as to the interest. The plaintiff executed a mortgage to the defendant as security for a loan at a usurious rate of interest. After the plaintiff had paid more than the amount of the principal as interest, the defendant foreclosed under power of sale and purchased the land himself. The plaintiff immediately brought a bill for the cancellation of the mortgage and the foreclosure deed. *Held* (two judges *dissenting*), that this bill could not be maintained. *Jones v. Meriwether* (1919, Ala.) 82 So. 185.

Under statutes making contracts for the payment of loans at a usurious rate of interest void, a judgment of foreclosure is valid, even though the debt for which it was rendered was void on account of usury. *Bell v. Fergus* (1892) 55 Ark. 536, 18 S. W. 931; *Wilkson v. Holton* (1904) 119 Ga. 557, 46 S. E. 620. A mortgagor can not avail himself of usury after a sale under power to a *bona fide* purchaser. *Ferguson v. Doden* (1892) 111 Mo. 208, 19 S. W. 727. But since the mortgagor has had no day in court, if the mortgagee, or a person with notice of the usury, becomes a purchaser at such a sale, it can be set aside. *Jackson v. Dominick* (1817, N. Y.) 14 Johns. 435; *Jordan v. Humphrey* (1884) 31 Minn. 495, 18 N. W. 450. If the plaintiff in the principal case had brought this action before the foreclosure he could have had the amount, which he had paid as interest, applied to the principal. *Barclift v. Fields* (1906) 145 Ala. 264, 41 So. 84. A sale under foreclosure in compliance with a power after the debt secured has been paid, may be vacated at any time before the statute of limitations has run, when the mortgagee is the purchaser. *Askew v. Sanders* (1887) 84 Ala. 356, 4 So. 167; *Liddell v. Carson* (1899) 122 Ala. 518, 26 So. 133. The principal case turned on the interpretation of the local statute. The majority of the court held that it required affirmative action on the part of the debtor before foreclosure under a power, in order to avail himself of the benefit of this statute. The minority contended that the debt was reduced *pro tanto* as the payments of usurious interest were made. It would seem that the view of the minority is more in accord with the spirit of the courts and the purpose of the statute.

SALES—RESCISSION—MUTUAL MISTAKE OF FACT.—The plaintiff purchased ten shares of bank stock from the defendant. The price was set according to the value shown by the books of the bank. These books later proved to be false, though neither party knew of this at the time of the sale. *Held*, that an innocent, mutual mistake respecting value did not empower the plaintiff to rescind. Hallam, J. *dissenting*. *Castello v. Sykes* (1919, Minn.) 172 N. W. 907.

The decision of the court seems clearly correct. Rescission will not be granted

in every case of a mutual mistake. See Black, *Rescission and Cancellation* (1916) sec. 134. Where there is a conscious assumption of risk, the courts will give no relief. *Wood v. Boynton* (1885) 64 Wis. 265, 25 N. W. 42. In the instant case, the parties relied upon the accuracy of the books of the bank in computing the value of the stock. Each knew of the possibility of falsification; each gambled on it. And a disappointed buyer or seller cannot be allowed to upset contracts because the value of any other collateral attribute of the stock resulted differently than expected. *Sankey v. First Nat. Bank* (1875) 78 Pa. St. 48. See *Cavanaugh v. Tyson* (1917) 227 Mass. 437, 116 N. E. 818, 820. The power to rescind in the case of a mutual mistake does not exist unless the physical object or legal relations actually received is different in substance from that bargained for. So the sale of a note will not be dissolved merely because the maker proved to be insolvent. *Hecht v. Batcheller* (1888) 147 Mass. 335, 17 N. E. 651. In the instant case, as in the above note case, the plaintiff received exactly what he intended to buy; a right or claim against the bank. In order to nullify a transaction, the difference in the properties of the object or in the jural relations which are the subject of the sale must be so substantial as would have affected the very basis or understanding on which the parties contracted. *Sherwood v. Walker* (1887) 66 Mich. 568, 33 N. W. 919. Yet what is a substantial difference is a matter of degree with much room for variance. Therefore, it is submitted, that the result must depend upon the usages and ideas of the business community; that it must be determined in each case, for what the money was paid, and what risks each party assumed, not simply whether the value or other such subsidiary quality has proved otherwise than expected.

TAXATION—INHERITANCE TAXES—FEDERAL ESTATE TAX—NOT CHARGEABLE TO GENERAL LEGATEE.—A will gave legacies of $25,000 each to testatrix's three cousins and left the residue to trustees for other beneficiaries. The executors, having paid a federal estate tax of over $50,000, which was about four *per cent.* of the whole net estate, deducted on account of such tax the same *per cent.* from each legacy. *Held,* that the federal estate tax was payable out of the estate and was not chargeable against the legatees. *In re Hamlin* (1919, N. Y. Ct. App.) 124 N. E. 4.

There would seem to be little room for debate as to the character of the tax upon the decedent's estate imposed by the Internal Revenue Law (Sept. 8, 1916) ch. 463, sec. 201. It is a tax upon the passing of the estate as a whole, not upon the transfer of the shares of the several beneficiaries. As pointed out in the principal case, the reports of the Congressional Committee in charge of the legislation as well as the language of the Act itself make this perfectly clear. And such has been the interpretation of the Act by other courts. See (1918) 27 YALE LAW JOURNAL, 1055; 28 *ibid.* 194, 517. But the executors argued that certain sections of the Act required, by implication, that the tax be equitably apportioned among all persons benefiting from the transfer of the estate. So the Surrogate court had ruled. Accord, *In re Douglass' Estate* (1918, Surr.) 171 N. Y. Supp. 956. The opposite view, which is now adopted by the Court of Appeals, is believed to be the correct interpretation of the Act. Under the English statutes "estate duty" upon property which passed to the executor at the time that the duty was imposed is similarly payable out of the residue. See 13 Halisbury, *Laws of England* (1910) 219; *Re Pullen* [1910] 1 Ch. 564. But real estate and other property not passing to the executor bears its rateable portion of the estate duty. 13 Halisbury, *op. cit.* 220; *In re Sharman* [1901] 2 Ch. 280. The alleged injustice of the principal case in placing the burden of

the entire tax upon the residuary legatee is no greater than when the residue is reduced by other expenses of administration. Besides the testator may, if he chooses, direct how the tax may be charged. See *Internal Revenue Law* (1918) sec. 408.

TORTS—CONVERSION—SUIT AGAINST UNITED STATES—TUCKER ACT.—Pursuant to a provision in a contract for public works with the principal contractor, the United States took over property of the plaintiff, a subcontractor, crediting its value to the principal contractor, and renting it to the defendant. The plaintiff sued for conversion. *Held*, that the defendant was liable because the taking by the United States was tortious. *Ball Engineering Co. v. White & Co.* (1919) 39 Sup. Ct. 393.

The Tucker Act permits suit against the United States upon claims arising from contracts, express or implied. 24 St. at L. 505, ch. 359. Claims sounding in tort are not suable. *Bigby v. United States* (1903) 188 U. S. 400, 23 Sup. Ct. 468. In the instant case, however, the suit was brought against the contractor to whom the United States delivered the property. This property was taken without the consent of the plaintiff and without any contract between the plaintiff and the government, either express or implied. Hence, the taking of the property by the United States was tortious even though it was considered the property of the principal contractor and its value credited to him. *Cf. Schillinger v. United States* (1894) 155 U. S. 163, 15 Sup. Ct. 85. Also the act of the defendant in receiving the property was tortious. See 38 *Cyc.* 2054, note 32. Had the United States considered the property to be plaintiff's, it could have been taken by eminent domain. *Brooks v. United States* (1904) 39 Ct. Cl. 494. But no such procedure having been employed, this taking in the instant case was a conversion. The United States was unjustly enriched by this tort, and if it were an individual, it could be sued by the plaintiff in *assumpsit* for the amount of the unjust enrichment. *Rittenhouse v. Knoop* (1894) 9 Ind. App. 126, 36 N. E. 384; *Kleinboke v. Hoffman House* (1906, N. Y.) 50 Misc. Rep. 127, 97 N. Y. Supp. 1122. The suit would be in quasi-contract, often called implied contract, although the facts show that no assent whatever was involved in the transaction. But it seems that the Tucker Act does not permit suit against the United States in quasi-contract as a remedy for the tort. The decisions under this Act are based on the construction that only contracts implied in fact, where the United States has signified its willingness and intention to pay the owner, are within the purview of the Act. *United States v. Berdan Fire Arms Co.* (1894) 156 U. S. 552, 15 Sup. Ct. 420; *Hill v. United States* (1893) 149 U. S. 593, 13 Sup. Ct. 1011. Decisions under previous Acts, almost identical with the Tucker Act, are in accord. *Hollister v. Benedict & B. Burnham Mfg. Co.* (1885) 113 U. S. 59, 5 Sup. Ct. 717. There seems to be little authority that the owner may disregard the tort and proceed against the United States in quasi-contract. See *Great Falls Mfg. Co. v. Attorney General* (1887) 124 U. S. 581, 598, 8 Sup. Ct. 631, 637. However, it would seem that where the owner waives the tort and sues in *assumpsit* that the claim is not one sounding in tort.

UNFAIR COMPETITION—FALSE ADVERTISING—FEDERAL TRADE COMMISSION.—The Federal Trade Commission found that the petitioner who was engaged in interstate commerce had been guilty of unfair competition in selling and advertising for sale sugars, teas, and coffees under representations that it had obtained special price concessions because of its large purchasing power and quick moving market. The petitioner was ordered by the commission to stop

these unfair methods of competition, particularly in regard to false advertising. The petitioner was also ordered to stop selling sugar at less than cost. The petitioner brought this bill in equity and prayed that the commission's injunction be declared vacated, because the petitioner had ceased these practices two years before, and because the act which created the Federal Trade Commission was unconstitutional and void; but if valid, it had not been infringed by these practices. *Held,* that the injunction should be modified to allow the petitioner to sell sugar at any price. Abschuler, J. *dissenting. Sears, Roebuck & Co. v. Federal Trade Commission* (1919, C. C. A. 7th) 258 Fed. 307.

It seems that the Act creating the Federal Trade Commission would be declared constitutional and valid, because grants of similar authority to individuals and bodies have been so held. *Union Bridge Co. v. United States* (1906) 204 U. S. 364, 27 Sup. Ct. 367; *Pennsylvania R. R. Co. v. International Coal Co.* (1912) 230 U. S. 184, 33 Sup. Ct. 893; *National Pole Co. v. Chicago & N. W. Ry. Co.* (1914, C. C. A. 7th) 211 Fed. 65. The petitioner's practices were clearly against public policy, and therefore infringements of this Act. In early law, there was no such remedy; and advertisements which injured one's business, but not one personally, were not actionable either at law or in equity. *Nonpareil Cork Mfg. C. v. Keasbey & Mathison Co.* (1901, C. C. E. D. Pa.) 108 Fed. 721; *White v. Mellin* (H. L.) [1895] A. C. 154. *Evans v. Harlow* (1844, Q. B.) Ad. & E. 624. However, business morals finally made themselves felt, and recovery was allowed against one who made false and malicious disparagement of another's goods. *Western Counties Manure Co. v. Lawes Chemical Co.* (1874) L. R. 9 Exch. 218. Injunctions against false advertising were eventually issued. *Thomas v. Williams* (1880) 14 Ch. D. 864; *Liebig's Co. v. Anderson* (1886) 55 L. T. Rep. N. S. 206. But goods may be sold at any price one may elect, and the court should not inquire into his motives. *Oyello v. Worsley* (1898) 1 Ch. 274; see *Allen v. Flood* (H. L.) [1898] A. C. 1. Cessation of unfair practices prior to the date of the trial is not an equitable ground for vacating an injunction, when at the time of the trial, the petitioner was still alleging that the Federal Trade Commission Act was unconstitutional and void, and that even if valid, there was no infringement by his acts. *Goshen Mfg. Co. v. Myer's Mfg. Co.* (1916) 242 U. S. 202, 37 Sup. Ct. 105; *Holmes v. Burnett* (1913, N. D. Ill.) 206 Fed. 66. This decision seems to point out that advertising and free competition are being further and further restrained. For an excellent discussion of the meaning of unfair competition, see Montague, *Unfair Methods of Competition* (1916) 25 YALE LAW JOURNAL, 20; Haines, *Efforts to Define Unfair Competition* (1919) 29 *ibid.* 1.

WILLS—CONTRACT TO DEVISE—EFFECT OF SUBSEQUENT MARRIAGE.—The plaintiff alleged that he had conveyed to his stepmother, then unmarried, certain land in consideration of her promise to devise this land to him on her death; that she had made a holographic will devising such land to him, but had later married the defendant, her administrator, who was appointed upon a petition alleging that the stepmother died intestate. The plaintiff asked that the defendant be decreed to hold the property in trust for him. *Held,* that although under the California statute the subsequent marriage revoked the will, the contract to devise was enforceable in equity, and the complaint stated a good cause of action. *Rundell v. McDonald* (1919, Calif. App.) 182 Pac. 450.

Contracts to devise have generally been enforced in equity. *Lawrence v. Prosser* (1917, Ch.) 88 N. J. Eq. 43, 101 Atl. 1040; *Steinberger v. Young* (1917) 175 Calif. 81, 165 Pac. 432. But such relief has been refused where unjust results would follow. *Sargent v. Corey* (1917) 34 Calif. App. 193, 166 Pac.

1021; *Owens v. McNally* (1896) 113 Calif. 444, 45 Pac. 710. Some jurisdictions hold a will made pursuant to such a contract irrevocable. *Chase v. Stevens* (1917) 34 Calif. App. 98, 166 Pac. 1035; *Baker v. Syfritt* (1910) 147 Iowa, 49, 125 N. W. 998. But the better view is to hold the will ambulatory and admit the later will to probate. *Rasteller v. Hoenninger* (1915) 214 N. Y. 66, 108 N. E. 210; see (1919) 28 YALE LAW JOURNAL, 709. This is preferable because it prevents the question of the validity of such contracts coming before the probate courts. See COMMENTS (1918) 27 YALE LAW JOURNAL, 542. The principal case is in accord with this authority in holding the contract enforceable notwithstanding the revocation of the will by the marriage.